Supreme Court, U.S.
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No. 92-1167

In The

Supreme Court of the United States

October Term, 1992

GERALD D. BUSH,

Petitioner,

v.

ZEELAND PUBLIC SCHOOLS,
MICHIGAN STATE TENURE COMMISSION,
STATE OF MICHIGAN,

Respondents.

Pro Se Petition For A Writ Of Certiorari To The Michigan Supreme Court

RESPONDENT ZEELAND PUBLIC SCHOOLS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this Court should exercise its discretion to review the reversal by the Michigan courts of a clearly erroneous decision of the Michigan Tenure Commission where there are no substantial federal issues properly before this Court, and the state law issues have no national applicability or significance?

II. Whether this Court should exercise its discretion to review the reversal by the Michigan courts of a clearly erroneous decision of the Michigan Tenure Commission where the state law issues were decided fairly and correctly by the Michigan courts, in accord with applicable Michigan law?

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STATEMENT OF THE CASE

Despite what one would gather from petitioner's statement of the case, the essential facts of this case are simple and largely undisputed. In the 1980-81 school year petitioner Gerald Bush was employed as a high school industrial arts teacher by respondent Zeeland Public Schools. Industrial arts was the only available position for which he was both certified by the State of Michigan and qualified as that term is defined by the collective bargaining agreement and accrediting agency standards. Of the three industrial arts teachers at Zeeland High School, Mr. Bush had the least seniority. (Ex. U)[1] Because industrial arts is an elective course, the number of classes offered is determined solely by student interest.

In the spring of 1981 student surveys revealed that industrial arts enrollment for the coming 1981-82 school year would drop dramatically. (Tr. 438-439) In fact, industrial arts enrollment fell from 318 students in 1980-81 to 237 students in 1981-82, a decline of 25%. (Ex. KK) Solely as a result of that decline in enrollment, and because Mr. Bush was the least senior industrial arts teacher, his position was reduced from full time to a three-fifths position. He refused to take the three-fifths position, and he was placed on layoff status. (Ex's. A-C) The Zeeland teachers' union grieved the layoffs of Mr. Bush and two other teachers, but the union found no basis for asserting that Mr. Bush's layoff was in any way improper, and the

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[1] References are to the transcript ("Tr.") of testimony taken and exhibits ("Ex.") entered during the Tenure Commission hearing of May 3-5, 1988.

grievance was withdrawn prior to arbitration. (Ex's. CC, DD; Tr. 133, 338)

Another teacher was hired to teach the three-fifths industrial arts position for the 1981-82 school year, and at the end of that school year that teacher had gained tenure. Accordingly, he continued to fill that position (which had then become a four-fifths position) for the 1982-83 school year. Mr. Bush and/or the teacher's union grieved the fact that the school district had not recalled him. The arbitrator ruled that pursuant to the collective bargaining agreement Mr. Bush should have been recalled. (Ex. E) Mr. Bush was therefore offered an industrial arts position for the 1983-84 school year, but he instead requested and was granted a sabbatical leave. (Tr. 254; Ex. F) Mr. Bush was advised by the Superintendent of Schools that he should take college courses during the sabbatical which would qualify him to teach other subjects, thereby increasing his employability, and that the school district would pay for those college courses. (Tr. 139-140; 261; 354-357) For whatever reason, Mr. Bush did not do so.

Student interest in industrial arts courses continued to drop significantly for the 1984-85 school year (enrollment declined to only 194 students), and the ten industrial arts classes were taught by the two industrial arts teachers senior to Mr. Bush. (Tr. 467-468; Ex. KK) Because Mr. Bush lacked the certification and qualification necessary to teach any other available course, he was again laid off for the 1984-85 school year. He protested that layoff, and he was offered the chance to immediately arbitrate his protest, but he chose not to do so (Ex's. AA, EE), and he remained on layoff through the 1985-86 school year.

In November, 1986, as part of a settlement of yet another grievance, Mr. Bush was recalled to an alternative education teaching position (Ex. O), and he remains to this day fully employed by the Zeeland Public Schools.

In October, 1987, over six years after his 1981 layoff, Mr. Bush filed a petition with the Michigan Teacher Tenure Commission challenging his layoff for the 1981-82 school year and the subsequent events up to the time of his recall. (Mr. Bush's Petition to the Tenure Commission is included as Appendix A.) That petition alleged two assignments of error. Mr. Bush claimed that (1) since the 1981-82 school year, the Zeeland Public Schools had failed to recall him to vacancies held by probationary teachers and/or for which he was certified and qualified; and (2) since the start of the 1981-82 school year the school district had constructively demoted and discharged him under the guise of necessary reductions in personnel by manipulating course offerings, class schedules, and teaching assignments without a legitimate educational basis, arbitrarily, capriciously, and in bad faith, all allegedly in violation of Article IV of the Michigan Tenure Act, M.C.L. 38.101, *et seq.*

Significantly, Mr. Bush made no claim that he had been laid off because he had exercised his First Amendment rights or that his First Amendment rights had been violated in any way. Nor did he make any claim that he had been discriminated against because he was not a member of the teachers' union. Mr. Bush has never filed either a claim with the Michigan Employment Relations Commission or the National Labor Relations Board or a lawsuit against the teachers' union claiming unfair representation.

A full evidentiary hearing was held on May 3-5, 1988 before a hearing officer of the Tenure Commission. Although Mr. Bush testified at length during that hearing, he made no claim that his First Amendment rights had been violated. In a Decision and Order dated August 30, 1989, the State Tenure Commission, by a four-to-one vote, granted Mr. Bush's petition and ordered the Zeeland Board of Education to pay all lost salary, the amount to be determined by a subsequent hearing. The Commission majority made the following finding:

> We find that had appellant been treated properly under the Act, he would not have been laid off for the 1981-82 school year but would have been fully employed as an industrial arts teacher or in a seventh or eighth grade position. Further, we find that he would have remained fully employed thereafter.

(See Appendix to Petition for Writ of Certiorari, p. 16a.) The Tenure Commission Chairperson filed a vigorous dissent.

In reaching its decision, the Tenure Commission majority committed numerous errors of Michigan law, the most significant of which were the following:

> 1. The Tenure Commission majority implicitly found that school district administrators had manipulated the course offerings and schedule to Mr. Bush's detriment. That finding was insupportable, because everyone who testified stated unequivocally that there was no such manipulation. For example, Mr. Bush called as his witnesses the high school counselors who participated in developing the course offerings and schedule. They testified there was no

manipulation whatsoever, and that the schedule was prepared solely to benefit the maximum number of students. The Commission majority simply ignored the undisputed fact that industrial arts enrollment had dropped 25%, which necessarily led to fewer industrial arts classes and a three-fifths position for the least senior industrial arts teacher, who happened to be Mr. Bush.

2. The Tenure Commission majority held that the school district had erred by *not manipulating* the schedule in Mr. Bush's favor. According to the Commission, the district was obligated in 1981-82 to keep Mr. Bush in a full time industrial arts position by assigning unspecified business classes to one of the more senior industrial arts teachers. This finding was erroneous for two reasons. First, there was no evidence that there were any such classes available without ousting other tenured teachers or disrupting the schedule. Second, under clearly established Michigan tenure law there was no obligation on the part of the school district to manipulate class offerings to favor Mr. Bush at the expense of other teachers. That body of established Michigan law was simply ignored.

3. The Tenure Commission majority also held that the school district had been obligated to retain Mr. Bush as a full time teacher by assigning him to seventh and eighth grade non-industrial arts positions for which he was certified but *admittedly not qualified* (Tr. 214-215), and bumping the tenured and qualified (but less senior) teachers who were already holding those positions. To reach this bizarre result, the Tenure Commission majority had to reach an absurdly

> strained interpretation of the collective bargaining agreement between the school district and its teachers' union. Among the many problems with this forced interpretation was that it ran directly counter to how the parties to the collective bargaining agreement had themselves always interpreted its provisions, which was to require that a teacher be both certified and qualified for a position. According to the Tenure Commission majority, however, because the school district continued to follow the parties' consistent interpretation of their own collective bargaining agreement and refused to displace the incumbent tenured teachers, all of whom were qualified, in favor of Mr. Bush, who was not qualified, the school district had been guilty of bad faith, a patently absurd result.

The Tenure Commission errors must have also been apparent to Mr. Bush, because on October 28, 1989, even though he had prevailed, he moved the Tenure Commission for a rehearing, which the Commission denied. Nowhere in his motion for a rehearing did Mr. Bush claim a denial of his First Amendment rights or discrimination by the school district because of his non-union status.

The Zeeland Public Schools appealed the Tenure Commission decision to the Ottawa County Circuit Court, and Mr. Bush cross-appealed the Tenure Commission's denial of his motion for rehearing. By opinion of January 16, 1991 and order of February 5, 1991, the circuit court reversed the Tenure Commission's decision and remanded to the Commission with instructions to enter an order denying Mr. Bush's petition, and affirmed the Commission's December 15, 1989 decision denying Mr.

Bush's motion for rehearing. The circuit court found several reversible errors in the Tenure Commission's majority decision, the two most important being the following:

> 1. There was no credible, competent, material or substantial evidence, as required by Michigan law, of any subterfuge in Mr. Bush's layoff, which the evidence established had resulted solely from a decline in industrial arts enrollment.
>
> 2. The Tenure Commission had misinterpreted the provisions of the collective bargaining agreement, had committed an error of law by refusing to consider the parties' own interpretation to that agreement which required all teachers to be qualified, and had abused its discretion in finding "bad faith" on the part of the school district for having merely followed the parties' consistent and reasonable interpretation of the agreement.

Mr. Bush sought leave to appeal the circuit court's decision to the Michigan Court of Appeals, which was denied by a two-to-one vote on July 19, 1991 and rehearing denied on September 30, 1991. The Michigan Supreme Court denied leave to appeal on April 24, 1992 and denied rehearing on July 31, 1992.

REASONS FOR DENYING THE WRIT

As shown below, petitioner has asserted no legitimate basis for this Court to exercise its extraordinary and discretionary jurisdiction.

I. THIS COURT SHOULD NOT GRANT PETITIONER'S PETITION SIMPLY BECAUSE HE IS PROCEEDING PRO SE.

Petitioner argues that this Court should grant his petition solely for the reason that he is a *pro se* litigant. This argument is fallacious, both factually and legally, and petitioner's petition is entitled to neither greater nor lesser consideration because he has chosen to proceed *pro se*.

The Court should first realize that Mr. Bush has not been proceeding *pro se* throughout the course of this matter. At critical stages he has been represented by counsel. At the Tenure Commission level, where Mr. Bush prevailed, he was represented by an experienced school law attorney. That attorney withdrew at the circuit court appeal level only after Mr. Bush had ignored his attorney's advice and moved *pro se* for a Tenure Commission rehearing, stating that the Tenure Commission majority decision in his favor contained "some errors", thereby seriously undermining the credibility of that decision.

Mr. Bush contends that he was "abandoned" and the circuit court erred in granting the attorney's motion to withdraw, even though Mr. Bush was at that time himself asserting to the circuit court that the attorney had a conflict of interest. (See Petition for Writ of Certiorari, p. 27).[2] Mr. Bush fails to note that the circuit court granted him an extension of time to file briefs, and that by the

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[2] Mr. Bush has now sued his original attorney for malpractice, which reflects the extent to which the attorney-client relationship had broken down.

time of the oral argument before the circuit court Mr. Bush had retained another attorney to represent him. That new attorney did not seek from the circuit court either a further continuance or leave to file any supplemental briefs. That same attorney represented Mr. Bush in the application for leave to appeal to the Michigan Court of Appeals.

Mr. Bush also claims that his arguments have been ignored by the lower courts because he was proceeding *pro se*. That claim fails in light of the fact that at every lower level except the Michigan Supreme Court Mr. Bush has been represented for at least some time by counsel. The mere fact that his arguments were rejected does not mean that they were not considered, it means only that they lacked merit.

The Court should also remember that Mr. Bush has been a full time employee of the respondent school district since November, 1987, now earning in excess of $45,000 annually. This is not a case of forced *pro se* representation because of indigency.

Finally, although there is a constitutional right to proceed *pro se*, that right does not also confer a license to ignore procedural rules or an exemption from substantive legal requirements. *Faretta v. California*, 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 2541 n. 46 (1975); *McKaskle v. Wiggins*, 465 U.S. 168, 183-184, 104 S.Ct. 944, 954 (1984), *reh. den.*, 465 U.S. 1112, 104 S.Ct. 1620 (1984), *on remand*, 729 F.2d 1026 (5th Cir. 1984), *aff'd*, 753 F.2d 1318 (5th Cir. 1985). Mr. Bush is not entitled to receive any elevated status because he has chosen to represent himself before this Court.

II. THIS CASE INVOLVES ONLY ISSUES OF MICHIGAN LAW WHICH HAVE NO NATIONAL APPLICABILITY OR SIGNIFICANCE.

As shown below, this case turns entirely on principles of Michigan tenure law, administrative agency law, and contract law. There are no federal statutory or constitutional issues legitimately before this Court. The principles of Michigan law which are involved are unique to Michigan and have no national applicability or significance. There is simply no reason for this Court to invoke its discretionary jurisdiction.

III. PETITIONER'S FIRST AMENDMENT CLAIMS WERE NOT RAISED OR DECIDED BELOW AND ARE NOT PROPERLY BEFORE THIS COURT.

Petitioner would have this Court believe that in 1981 the respondent school district reduced his position to a three-fifths position (which he chose to decline, instead going on layoff), because he had exercised his First Amendment rights by speaking out against, and refusing to join, the teachers' union. He also claims the union discriminated against him in its representation of him because he was not a union member and that the respondent school district is somehow responsible for this alleged discrimination. (See Petition for Writ of Certiorari, pp. 3, 17.) Petitioner's argument is fatally flawed, because he never raised these claims in either his petition, briefs, or testimony to the Tenure Commission, or in his motion for rehearing to the Tenure Commission. These claims were therefore never decided by either the Tenure Commission or any of the courts below. (See Mr.

Bush's Petition to the Tenure Commission dated October 29, 1987, included as Appendix A to this brief.)

This Court generally refrains from addressing issues not asserted or passed upon in the lower courts. *U.S. v. Williams*, ___ U.S. ___, 112 S.Ct. 1735, 1738-39 (1992); *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24, 106 S.Ct. 1678, 1681 (1986). There is no reason to deviate from this practice here, particularly since there is simply no record on which this Court could consider these claims. The Court would have nothing other than Mr. Bush's rambling speculation on which to render an opinion.

Certainly if Mr. Bush believed that the respondent school district had taken any action against him in 1981 because of his exercise of First Amendment rights, he and his attorneys had an obligation to raise that claim before coming to this Court over ten years later. They did not. Similarly, if Mr. Bush felt the teachers' union had unfairly represented him in these proceedings or in any matter, he could have pursued those claims against the union in any number of administrative or judicial forums. He did not. He should not now be allowed to raise those claims solely in a transparent effort to concoct some basis for seeking this Court's jurisdiction.

IV. PETITIONER WAS NOT DEPRIVED OF PROCEDURAL DUE PROCESS, A CLAIM WHICH HE HAS FAILED TO PRESERVE IN ANY EVENT.

At pages 29-30 of his petition to this Court, petitioner cites quotations from the case of *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985), *on remand*,

763 F.2d 202 (6th Cir. 1985), *on remand*, 651 F. Supp. 92 (N.D. Ohio 1986), *aff'd*, 844 F.2d 304 (6th Cir. 1988), *cert. den.*, 488 U.S. 946, 109 S.Ct. 377 (1988), but he does not expressly claim that he was deprived of procedural due process. If he is asserting such a claim, it is without merit. First, petitioner failed to raise a claim of lack of procedural due process to any of the courts below. (He did raise it in his petition to the Tenure Commission, but that was prior to his receiving the full evidentiary hearing.) This Court should therefore not consider this claim for that reason alone.

Second, to the extent *Loudermill* even applies to this case,[3] Mr. Bush has received all the due process to which he is entitled. In *Loudermill*, this Court held that when a public employer seeks to discharge an employee who has a property interest in continued employment, procedural due process requires the employer to provide notice and an opportunity to be heard "at a meaningful time and in a

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[3] *Loudermill* is distinguishable because it was a discharge for misconduct case. Here Mr. Bush was laid off after he refused to take a three-fifths position resulting from declining enrollment. The extent of a property interest in public employment is determined by state law. *Bishop v. Wood*, 426 U.S. 341, 345, 96 S. Ct. 2074, 2077 (1976). Although Mr. Bush was a tenured teacher, the Michigan tenure law which creates the property interest clearly provides that in a layoff situation, there is no right to a pre-termination hearing. M.C.L. 38.105; *Goodwin v. Board of Education*, 82 Mich. App. 559, 267 N.W.2d 142 (1978); *Steeby v. School Dist. of Highland Park*, 56 Mich. App. 395, 224 N.W.2d 97 (1974). Thus, the property interest in a Michigan public school teaching position is not so expansive that it includes a pre-layoff hearing, and *Loudermill* is inapplicable.

meaningful manner," which is generally before the deprivation occurs. *Id.* at 533, 105 S.Ct. at 1488 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 1191 (1965)). The essential elements of a *Loudermill* hearing are "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 470 U.S. at 546, 105 S.Ct. at 1495. The *Loudermill* court indicated that the pre-termination hearing could be merely a "right-of-reply" hearing as a check against mistaken decisions. 470 U.S. at 545, 105 S.Ct. at 1495.

Courts construing the *Loudermill* holding have required only the barest of a pre-termination procedure, especially when an elaborate post-termination procedure is available. *See, e.g., Guris v. McFaul*, 801 F.2d 225, 227-28 (6th Cir. 1986), *appeal after remand*, 844 F.2d 789 (6th Cir. 1988) (indicating that an interview prior to termination by one not the decision-maker is adequate); *Lee v. Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062, 1068-69 (6th Cir. 1984) (all that is required is an "abbreviated opportunity to respond," and a letter informing one of the charges and a meeting to explain them was sufficient); *Duchesne v. Williams*, 849 F.2d 1004, 1005 (6th Cir. 1988), *cert. den.*, 489 U.S. 1081, 109 S.Ct. 1535 (1989) (the "hearing" could be before the supervisor initiating the employment action).

In this case petitioner's pre-termination constitutional due process rights were fully protected. It is undisputed that Mr. Bush received oral and written notice of his impending layoff and was advised of the reasons for it (declining enrollment). Mr. Bush corresponded with the school district about the layoff and recall situation, and it

was Mr. Bush, after all, who chose to reject the three-fifths position. It is also undisputed that the teachers' union grieved Mr. Bush's layoff on his behalf before the start of the 1981-82 school year, taking it through two steps of the grievance process. Although that grievance was withdrawn for lack of grounds prior to reaching arbitration, the internal grievance process itself fully satisfies the minimal requirements of *Loudermill*. To require any greater procedural rights prior to a layoff would cause serious harm to a public school district. As indicated in note 3 above, Michigan law does not so require.

Furthermore, the sufficiency of the pre-layoff procedures here is even more pronounced in light of the extensive post-layoff procedures which were available to and in fact utilized by petitioner, the existence of which is extremely significant in analyzing a deprivation of procedural due process claim. *See Hudson v. Palmer*, 468 U.S. 517, 533, 104 S.Ct. 3194, 3203 (1984), *on remand*, 744 F.2d 22 (4th Cir. 1984). Here, petitioner always had available to him and in fact requested and received a Tenure Commission evidentiary hearing which gave him full opportunity to challenge the grounds for his 1981-82 layoff, with appeal rights or opportunities to three different state courts: the Ottawa County Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court. In addition, he had the right to, and on two subsequent occasions utilized, the union grievance procedure, which provided for binding arbitration.

For all of these reasons any claim petitioner makes for lack of procedural due process is without merit.

V. MICHIGAN LAW REQUIRED THAT THE TENURE COMMISSION DECISION BE REVERSED. THE CIRCUIT COURT COMMITTED NO ERROR IN DOING SO.

Petitioner argues that the Ottawa County Circuit Court committed errors of law in reversing the Tenure Commission majority decision. Petitioner is wrong. The Tenure Commission majority decision was so erroneous as a matter of well established Michigan law that it could not stand, and the circuit court was totally correct in reversing the Tenure Commission decision on appeal. Both the Michigan Court of Appeals and the Michigan Supreme Court correctly found no reason to review the circuit court's decision, and there is no legitimate basis for this Court to now review the Michigan courts.

The legal errors contained in the Tenure Commission's decision which required its reversal include the following:

1. Michigan law requires that an adjudicatory decision of an administrative agency like the Tenure Commission must be based on competent, material, and substantial evidence on the whole record. M.C.L. 24.306(1)(d). If it is not, the decision must be reversed. *Board of Education for Garden City v. Brisbois*, 164 Mich. App. 74, 417 N.W.2d 84 (1987), *app. den.*, 429 Mich. 897 (1988). Here there was simply no evidence of subterfuge or course manipulation whatsoever, and the circuit court could have correctly reversed for that reason alone.

2. The school district met its burden to show a legitimate basis for the position reduction and resulting layoff by the undisputed evidence of the substantial (25%) decline in industrial arts student enrollment. Under Michigan tenure law, the burden was then on Mr. Bush, not the school district, to prove bad faith or subterfuge. *Maine v. Melvindale-Northern Allen Park Public Schools*, TTC 85-7, pp. 7-8. He could not and did not do so.

3. The Tenure Commission improperly interpreted the collective bargaining agreement to require the school district to remove incumbent, qualified, and tenured 7th and 8th grade teachers and replace them with Mr. Bush, solely because of his seniority, even though he was *unqualified* for any of those positions. This decision was erroneous because it ignored established principles of Michigan law governing contract interpretation, *Stark v. Budwarker, Inc.*, 25 Mich. App. 305, 314-315, 181 N.W.2d 298 (1970); *Detroit Greyhound Employees Federal Credit Union v. Aetna Life Ins. Co.*, 381 Mich. 683, 167 N.W.2d 274 (1969), and was an unlawful attempt by the Tenure Commission to redefine job qualifications, a decision reserved to local boards of education. *Chester v. Harper Woods School District*, 87 Mich. App. 235, 245, 273 N.W.2d 916 (1978).

4. The Tenure Commission decision improperly required the respondent school district to manipulate course offerings and schedules to favor Mr. Bush, but under established Michigan tenure law a school district has no obligation to do so. *Wogerman v. Branch Intermediate School District*, TTC 81-42; *Valesano v.*

White Pine School District, TTC 78-47; *Maciak v. Center Line Public Schools*, TTC 78-18; *Hadacz and Kukura v. Northwest Bd. of Educ.*, TTC 83-36.

5. The Tenure Commission erred in relying on substantially later events to attempt to establish bad faith in 1981. There was no competent, substantial, or material evidence on the whole record to support a finding that those events indicated bad faith when they occurred, let alone several years earlier, and the circuit court properly so found.

The circuit court's decision reversing the Tenure Commission decision was completely proper and fully in accord with Michigan law.

CONCLUSION

For the reasons set forth above, petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

PETITION BEFORE THE MICHIGAN TENURE COMMISSION

STATE OF MICHIGAN STATE
TENURE COMMISSION

GERALD BUSH,

Appellant,

vs. Docket No. 87-30

BOARD OF EDUCATION
OF THE ZEELAND
PUBLIC SCHOOLS,

Appellee.

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PETITION

Gerald Bush, the above-named Appellant, by his attorneys, Foster, Swift, Collins & Coey, P.C., hereby petitions for a hearing and appeals the decisions of Appellee Board, and as a basis alleges as follows:

I. FACTS

1. Appellant Gerald Bush (hereinafter referred to as "Bush") is a "certificated" "teacher" within the meaning of Sections 1 and 2 of Article I of the Michigan Teacher Tenure Act. His address is 724 East Central, Zeeland, Michigan 49464.

2. Appellee Board of Education of the Zeeland Public Schools (hereinafter referred to as the "Board") is a "controlling board" within the meaning of Section 3 of Article I of the Michigan Teacher Tenure Act. Its address is P.O. Box 110, Zeeland, Michigan 49464.

3. At the commencement of the 1971-72 school year and continuously to date Bush has had tenure status in Appellee School District.

4. Bush commenced employment with the Board on September 2, 1969, and through the 1980-81 school year taught classes exclusively in the industrial arts area.

5. In March or April 1981, Bush was verbally notified by the high school principal that his hours would be reduced from five-fifths to three-fifths because he was lowest in seniority in the Industrial Arts Department. Thereafter, in June 1981, Bush received written notice from the Board that his teaching hours would be reduced from five to three classes per day. After such action was questioned, the Board laid off Bush and concurrently offered to him a three-fifths position. Bush rejected the position because it was less than full-time. He maintained his rights to be recalled, and the Board acknowledged such by placing him on the recall list.

6. At the commencement of the 1982-83 school year, the Board had an opening in a four-fifths position in the industrial arts area for which Bush was certified, qualified and had previously held. It failed to offer Bush the position.

7. At the commencement of the 1983-84 school year, the Board had an opening in a full-time position in the industrial arts area for which Bush was certified, qualified and had previously held. But, Bush took a sabbatical leave during the 1983-84 school year pursuant to the terms of a settlement agreement between he and the Board dated August 26, 1983. The settlement agreement was the result of an arbitration award rendered against the Board in favor of Bush concerning its failure to offer him the part-time position for the 1982-83 school year referred to in paragraph 6 above. Bush contends the agreement provided for his return to active employment at the commencement of the 1984-85 school year. The Board denied such and failed to reemploy Bush for the 1984-85 school year but acknowledged he remained on the recall list.

8. At the commencement of the 1986-87 school year, the Board had another opening, a full-time position in the industrial arts area for which Bush was certified, qualified and had previously held. It failed to offer Bush the position. On November 24, 1986, Bush returned to active employment with the District on a full-time basis in an alternative education position, for which Bush was certified and qualified, pursuant to a settlement agreement between Bush and the Board with respect to a grievance he had filed regarding his failure to be recalled for the 1986-87 school year. The agreement provided Bush's

return and did not constitute an admission by the Board for any purpose or a waiver by Bush of any of his rights under the Tenure Act.

9. During and since the 1981-82 school year the Board has employed probationary and/or lower seniority teachers in positions for which Bush was both certified and qualified.

10. Immediately prior to the 1981-82 school year and since the Board, through certain of its administrators, has engaged in a manipulation of course offerings, class schedules and teacher assignments so as to place itself in the position of being purportedly unable to offer Bush a position for which he was certified and qualified. This manipulation of course offerings, schedules and assignments was done without a legitimate educational basis, arbitrarily, capriciously and in bad faith as a result in part of the animus which certain administrators had for Bush. As a result, Bush was constructively demoted and discharged without reasonable and just cause under the guise of a reduction in personnel.

11. The Board has never provided to Bush notice of his tenure rights. Nor has the Board provided to Bush any of the protections required under Article IV of the Act, including, but not limited to, charges, notice and the opportunity for a due process hearing. —

II. ASSIGNMENT OF ERROR

Appellee Board of Education has erred in that:

1. During and since the 1981-82 school year it has failed to recall Bush to vacancies held by probationary

teachers and/or for which he was certified and qualified in violation of his rights under Section 5 of Article IV of the Act.

2. Since the commencement of the 1981-82 school year it has constructively demoted and discharged Bush under the guise of necessary reductions in personnel by manipulating course offerings, class schedules and teacher assignments without a legitimate educational basis, arbitrarily, capriciously and in bad faith. The Board had no reasonable and just cause to demote or discharge Bush and did so without charges, notice and a hearing, all of which is in violation of his rights under Article IV of the Act.

III. RELIEF

WHEREFORE, Appellant Gerald Bush respectfully requests that this Commission:

1. Hold a private hearing on this appeal within sixty (60) days pursuant to Section 1 of Article VI of the Act.

2. Find that the assignments of error as set forth in Section II are valid.

3. Reinstate Bush to full-time active employment with the Board in an industrial arts position for which he is certified and qualified, ordering the Board to grant Bush full back pay and economic benefits, plus interest, and all those other rights, privileges and benefits of employment which would have accrued to him to date had he not been wrongfully constructively demoted and

discharged since the commencement of the 1981-82 school year through November 24, 1986.

4. Grant to Bush his costs, expenses and reasonable attorneys' fees incurred in prosecuting this action.

5. Grant such other relief and issue such affirmative orders as this Commission deems is just, equitable and required to effectuate the purposes and policies of the Michigan Teacher Tenure Act.

Respectfully submitted,
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